

DOCUMENT RESUME

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[Protest of any Award on Solicitations for Various Indicators for Flight Simulators]. B-187406. May 3, 1977. 6 pp.

Decision re: ERA Industries, Inc.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services:
Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Air Force: Ogden Air Logistics Center, Hill AFB, UT; Linair, Inc.

Authority: A.S.P.B. 3-805.2. A.S.P.B. 1-1902(a)(i)(A). 51 Comp. Gen. 247. 51 Comp. Gen. 250. B-176256 (1972). B-182991 (1976). B-182903 (1976).

The protest was based on the untimeliness of three of the low bidder's proposals, the nonresponsiveness of all four proposals, and the Air Force's alleged knowledge of probable misuse of protester's proprietary data by low bidder. Protest was denied. (SS)

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Henry Bufford
Proc. I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-187406

DATE: May 3, 1977

MATTER OF: ERA Industries, Inc.

DIGEST:

1. Contrary to protester's unsupported allegation that proposed contractor's initial proposals were untimely, proposals bear date stamps evidencing their timely receipt by the Air Force prior to the date for submission of initial proposals.
2. Where solicitation in negotiated procurement required qualification of new sources for item through submission of evidence "prior or concurrent with proposal," fact that sufficient evidence of qualification may not have been furnished with initial proposal and negotiation was necessary to resolve matter did not require rejection of proposal as outside the competitive range. Agency believed there was reasonable chance proposal would be selected for award after negotiation and matter is a proper subject of negotiation.
3. Qualification of proposed contractor as new source on basis of experience in reverse engineering and rebuilding item utilizing data package obtained from prime contractor is consistent with solicitation clause permitting qualification through submission of engineering data. While engineering data was not actually submitted for evaluation, intent of requirement was satisfied because offeror will use engineering data furnished it by a source which had been previously approved.
4. Protester's argument that solicitation should have been cancelled and resolicited rather than revised during negotiation to provide for first production articles and certification that equipment will conform in form, fit and function is rejected. It does not appear that potential suppliers were dissuaded from participating in initial solicitation and revision did not affect protester's ability to participate in competition because protester was a previously approved source.

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- 5. GAO is not in position to adjudicate dispute between private parties concerning their respective rights in data and until those rights are established in proper forum an ongoing procurement will not be disturbed. Moreover, Air Force obtained assurance that proposed contractor's legitimate source of engineering data was prime contractor for items.**
- 6. Whether proposed contractor is able to obtain component of required item from sole manufacturer is question of agency's affirmative determination of firm's responsibility which is not reviewable by GAO in absence of showing of fraud on part of procuring officials or other circumstances not applicable here.**

ERA Industries, Inc. (ERA) protests any award to Linair, Inc. (Linair) by the Ogden Air Logistics Center, Department of the Air Force, under Request for Proposals (RFP's) F42600-76-R-6584, -6675, -6681, and -6693. Awards to Linair on these solicitations, for various indicators for flight simulators, have been delayed pending resolution of this protest.

Essentially, ERA argues that three of Linair's proposals were submitted late and all four proposals did not meet the required source approval criteria of the solicitations. In addition, ERA argues that the Air Force was on notice of the probable misuse by Linair of ERA's proprietary data and that award should not be made to Linair unless it can be ascertained that Linair's use of such data is authorized. Finally, ERA argues that Linair will be unable to obtain and furnish the Government a critical component of the items to be supplied under these solicitations.

Concerning the timeliness of Linair's initial proposals, the Air Force originally issued RFP -6584 with a closing date of April 7, 1976 for receipt of initial proposals and, contrary to the protester's unsupported allegations, the record shows that Linair submitted a timely initial proposal which was date stamped as received by the Air Force on April 5, 1976. Also, initial proposals under RFP's -6681 and -6694 were required to be submitted by April 21, 1976 and the record shows that Linair's proposals under these solicitations were received on April 13 and 16, 1976, respectively. ERA does not contest the timeliness of Linair's proposal under RFP -6675. Accordingly, we find no merit to ERA's position that Linair's initial proposals were submitted late.

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Each of these solicitations listed Singer Company (Singer) and Occo Manufacturing Company (Occo), a predecessor of the protester, as approved sources for the items and permitted other offerors to qualify under any one of four alternative methods. In pertinent part, the RFPs provide as follows:

"D-2 REQUIRED SOURCE APPROVAL

"a. The source(s) listed below have been approved by the Government for supply of the spare/component parts called for herein in order to assure the requisite safe, dependable, effective operation and support of military equipment. Offerors other than the below listed source(s) will NOT be considered for award under this solicitation UNLESS:

* * * * *

(2) The offeror submits prior to or concurrent with its proposal evidence of having satisfactorily produced the required item(s) for the Government or the prime equipment manufacturer(s); OR,

* * * * *

(4) The offeror submits prior to or, concurrent with its proposal such complete and current engineering data for the item(s) (including manufacturing control drawings, qualification test reports, quality assurance procedures, etc.) as may be required for evaluation purposes to determine the acceptability of the item as supplied by your firm for Government use.

"b. Offers based on the submittal of approval information in accordance with paragraph (a) hereof MAY, as determined by the Contracting Officer, be considered for award under this solicitation ONLY IF:

(1) The evaluation of such offers is practicable and in the Government's interest considering the availability of resources and cost to the Government for the qualification of new sources for the required item(s) as well as the advantages anticipated to be derived by the Government as a result of such qualification; AND,

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(2) The Government can, in fact, determine that the item, as supplied by your firm, is acceptable for Government use; AND,

(3) In all cases, the evaluation/verification of the submittal and the requisite approval and award thereon can be made in time to meet the Government's requirement." (Attach. A, §§ D-2a, b.) (Emphasis in original.)

ERA contends that Linair's initial proposals should have been rejected as outside the competitive range because insufficient information was contained therein to permit the Air Force to approve Linair as a source for the indicators. Moreover, ERA argues that, to date, Linair neither has furnished the Air Force a complete and current data package to permit consideration of the firm as an approved source nor has met any of the other source approval conditions.

We do not agree with ERA that the absence of approval information in an initial proposal requires that the proposal be rejected as not within the competitive range. While the required source approval clause permits the offeror to submit approval information either "prior to or concurrent with its proposal," we do not construe the clause as precluding a revision of a proposal during the course of negotiation. It is elementary that the rigid rules of bid responsiveness in formally advertised procurements do not apply to negotiated procurements. Even if the source approval requirement is considered a matter of responsiveness rather than responsibility as argued by the protester, "nonresponsiveness" is ordinarily considered to be a subject of negotiation. 51 Comp. Gen. 247, 250 (1971). A proposal should not be rejected as outside the competitive range if, as here, there is a reasonable chance it will be selected for award. Armed Services Procurement Regulation (ASPR) § 3-805.2 (1976 ed.). Moreover, we have viewed a similar requirement for qualification of approved sources as a matter of responsibility, rather than responsiveness, and have permitted offerors to furnish sufficient evidence any time prior to award to convince the Government that it is capable of manufacturing the item. B-176256, November 30, 1972.

ERA argues that Linair should not be considered an approved source because the only basis under which it could conceivably qualify is through the submission of complete and current engineering data for the items, which Linair has not done. The record shows that Linair persuaded the Air Force to qualify

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it as a new source based on its experience in rebuilding the required equipment and similar units for Singer, the prime contractor for the simulators, and for Hill Air Force Base. Linair states that it obtained the data package from Singer to permit fabrication of replacement parts. The contracting officer believes that Linair has acquired knowledge of the items through reverse engineering performed in the course of repairing the items. In the process of qualifying as a source for these items, Linair submitted a list of subparts and part numbers to show that it possessed the data necessary to produce the indicators. This list was on Occo stationery but did not contain a proprietary rights legend. Apparently, the Air Force does not consider it necessary in these circumstances to require submission of the detailed data indicated by the list of subparts submitted by Linair. Counsel for the procuring activity argues that such action comports with the intent of the source approval clause which provides for the submission of "such complete and current engineering data * * * as may be required for evaluation purposes to determine the acceptability of the item [to be] supplied * * *."

Inasmuch as Linair proposed to use engineering data furnished by the original prime contractor for the simulator, the data was obtained from a source having Government approval. Therefore, the Air Force was satisfied that Linair had available to it such approved data and in such circumstances it was reasonable for the Air Force not to require submission and evaluation of the complete data package. We believe the underlying intent of the source approval clause was satisfied. Clearly, the purpose of the clause is to protect the Government's interests, and the Government must determine in each case the extent of data needed to protect its interests.

In addition, the Government's interests appear to have been adequately considered in that the solicitation was revised at the insistence of Air Force technical advisors to include requirements for first production articles and for certification that the equipment conforms in form, fit and function to the specifications. We agree with ERA's position that this provision did not diminish the requirements of the source approval clause. In addition, ERA argues that the change was critical and should have resulted in the cancellation of the solicitation and reprourement of the requirement. However, we cannot conclude that others like Linair, who previously were not approved, were dissuaded from participating in the procurement.

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Inasmuch as the indicators previously had not been furnished by Linair to the Government, the requirement for first article approval was appropriate. ASPR § 1-1902(a)(1)(A) (1976 ed.). Furthermore, ERA was an approved source and the first article requirement did not materially affect its ability to participate in this procurement.

We do not agree with ERA's argument that the Air Force may not make award to Linair because it was on notice of the probable misuse by Linair of ERA's proprietary data. While the list of subparts for which data was available was apparently reproduced from an Occo document, there was no indication thereon of any proprietary claim by Occo. Nevertheless we believe the Air Force obtained sufficient assurance that Linair's legitimate source of the detailed drawings was the prime contractor for the simulators. Moreover, as indicated in Garrett Corporation, B-182991, B-182903, January 13, 1976, 76-1 CPD 20, we are not in a position to adjudicate a dispute between private parties concerning their respective rights in data and until those rights are established in a proper forum we will not disturb an ongoing procurement.

Finally, ERA argues that the indicating tapes, a component of these indicators, can be manufactured by only one concern and that Linair will not be able to supply the items as promised. Essentially, this argument questions the Air Force's affirmative determination that Linair is responsible, or able to furnish the promised items. However, this Office no longer reviews such determinations, except for fraud on the part of procurement officials or where the solicitation contains definitive responsibility criteria which allegedly have not been met. The solicitation does not require the offeror to demonstrate its ability to furnish the component in question and therefore is not a matter for our consideration. We note, however, that Linair has produced written assurance that the component is available to it from the concern involved.

Accordingly, the protest is denied.


For the Comptroller General
of the United States